Nasser Ali Azayez Maktoum Al Sheraifi & Ors v Affinity Heights Sdn Bhd (in receivership)

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO WA-28NCC-3–01 OF 2017
MOHD NAZLAN J
17 AUGUST 2017

Civil Procedure — Affidavits — Cross-examination of deponent of affidavit — Respondent sought to cross-examine petitioners as deponents of affidavits — Whether granting cross-examination of deponent within discretionary power of court — Whether applicant bore legal burden to convince court — Whether application made in good faith — Whether disputed issues relevant — Whether contemporaneous documents sufficient to grant cross-examination

Company Law — Winding up — Petition — Whether granting cross-examination of deponent within discretionary power of court — Whether applicant bore legal burden to convince court — Whether application made in good faith — Whether disputed issues relevant — Whether contemporaneous documents sufficient to grant cross-examination — Companies Act 1965 s 218(1)(f) & (i)

This was an application in encl 27 by the respondent seeking to cross-examine the petitioners who were the deponents of the affidavits supporting their winding up petition against the respondent. The petitioners had entered into a shareholder agreement with Low Loon Chian, Low Say Boon, Low Bee Loy and Elsie Yeo Lai Cheng ('the local parties') for the purpose of developing a piece of land held under Hak milik Tanah No PN 180, Lot 463, Seksyen 19, Bandar Kuala Lumpur into a 33 storey — condominium known as St John Wood Residence ('the project'). The project failed and the respondent was now in receivership. On 3 January 2017, the petitioners filed a winding up petition against the respondent. The petition was premised on s 218(1)(f) and (i) of the Companies Act 1965 ('the Act') which concerned the grounds of the directors having acted in the affairs of the company in their own interest or in any manner which appeared to be unfair or unjust to the members and that it was just and equitable that the company was wound up.

Held, dismissing respondent's application with costs:

(1) Having considered the case law authorities on applications to cross-examine, much of which should similarly applied in winding up proceedings, which were also heard on affidavit evidence, the

applications by the respondent was found to be lacking in both merit and substance. The court's power to order or refuse cross examination of a deponents of an affidavit was discretionary. The courts were generally slow to allow cross-examination of a deponents in an interlocutory matter. Further, It was the applicant for leave to cross-examine a deponent who bore the legal burden to convince the court to exercise its discretion to grant the leave (see paras 22–24).

(2) It was found that the petitioners had produced by way of exhibits, supporting documents to strengthen their averments vis a vis the petition which ran into five thick volumes. On contradistinction, the averments in reply made by the respondent were not accompanied by documents in support. Thus, the true motivation of the respondent in filling the present application was in some doubt and good faith could not readily be imputed (see para 26).

(3) The respondent failed to demonstrate with specificity the issues in dispute arising from the affidavits and failed to show that the disputed issues were truly relevant to be decided in the present application. Instead, the respondent merely produced the entirety of most of the paragraphs which appeared in the petition without more. This was demonstrably deficient and could not progress the respondent's application to cross-examine the deponents (see paras 30–31).

(4) It was imperative to state that the mere fact that the respondent claimed to dispute the relevant averments of the petitioners was manifestly insufficient basis to warrant cross-examination. The petitioners had exhibited various documents; the respondents must do more than merely dispute without adequate substantiation by producing its own documentary evidence to furnish a basis for its disputation (see para 38).

[Bahasa Malaysia summary

Ini merupakan satu permohonan dalam lampiran 27 oleh responden memohon untuk memeriksa balas pempetisyen yang merupakan deponen-deponen dalam afidavit sokongan petisyen penggulungan terhadap responden. Pempetisyen telah memasuki satu perjanjian pegangan saham bersama Low Loon Chian, Low Say Boon, Low Bee Loy dan Elsie Yeo Lai Cheng ('pihakb-pihak tempatan tersebut') bagi tujuan pembangunan sebidang tanah di bawah Hak milik Tanah No PN 180, Lot 463, Seksyen 19, Bandar Kuala Lumpur kepada kondominium 33 tingkat dikenali sebagai St John Wood Residence ('projek tersebut'). Projek tersebut gagal dilaksanakan dan responden sekarang berada dalam receivership. Pada 3 Januari 2017, pempetisyen telah memfailkan satu petisyen penggulungan terhadap responden. Petisyen tersebut adalah tertakluk pada s 218(1)(f) dan (i) Akta Syarikat 1965 yang berkaitan dengan tindakan pengarah yang menguruskan syarikat untuk kepentingan peribadi di mana tindakan tersebut adalah tidak

adil dan tidak saksama dan adalah menjadi satu tindakan yang adil untuk menggulungkan syarikat. A

Diputuskan, menolak permohonan responden dengan kos:

(1) Berdasarkan kepada autoriti-autoriti kes berkaitan permohonan untuk pemeriksaan balas, yang juga terpakai dalam prosiding penggulungan yang didengar melalui keterangan afidavit, permohonan responden telah didapati tidak bermerit. Kuasa mahkamah dalam membenarkan atau tidak membenarkan pemeriksaan balas terhadap deponen dalam afidavit merupakan kuasa budi bicara mahkamah. Mahkamah secara amnya tidak membenarkan pemeriksaan balas terhadap deponen dalam tindakan interlokutori. Beban perundangan adalah terletak pada pemohon untuk menyakinkan mahkamah dalam menggunakan kuasa budi bicara untuk membenarkan permohonan pemeriksaan balas (lihat perenggan 22–24). B C D

(2) Adalah didapati bahawa pempetisyen telah mengemukakan dokumen sokongan yang mengandungi lima jilid. Sebagai perbandingan, dokumen balasan yang dikemukakan responden tidak dilampirkan dengan apa-apa dokumen sokongan. Oleh itu, motivasi sebenar responden dalam memfailkan permohonan semasa adalah diragui dan niat baik responden tidak boleh terpakai dalam permohonan semasa (lihat perenggan 26). E

(3) Responden gagal menunjukkan secara spesifik isu-isu yang menjadi pertikaian dalam afidavit dan gagal mengemukakan isu-isu yang relevan untuk diputuskan dalam permohonan semasa. Sebaliknya, responden hanya mengemukakan keseluruhan perenggan yang terkandung dalam permohonan petisyen. Ini adalah cacat dan tidak dapat menyokong permohonan responden untuk membuat permeriksaan balas terhadap deponen-deponen (lihat perenggan 30–31). F G

(4) Adalah penting untuk menyatakan bahawa tuntutan responden untuk mencabar pengakuan pempetisyen adalah tidak mencukupi bagi membenarkan satu pemeriksaan balas dibuat. Pempetisyen telah mengemukakan pelbagai dokumentasi dan responden sepatutnya perlu menyangkal keterangan pempetisyen dengan mengemukakan keterangan secara bertulis sebagai asas dalam pertikaian terhadap pempetisyen (lihat perenggan 38).] H

Notes I

For a case on cross examination of deponent to afidavit, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 515.

For cases on winding up petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Balwant Singh Purba v R Rajasingam [1987] MLJU 3; [1987] CLJ Rep 468, HC (refd)

Charles Koo Ho-Tung v Koo Lin Shen [2015] MLJU 765; [2016] 2 CLJ 267, HC (refd)

Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor [2007] 7 MLJ 618, HC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd [2001] 4 MLJ 56; [2002] 1 CLJ 1, CA (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

Syarikat Tungaring Kilang Papan Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors [1990] 2 MLJ 38, HC (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)

Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd [2007] 4 MLJ 638; [2007] 4 CLJ 487, CA (folld)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 181, 218(1)(f), (1)(i), 221

Companies Act 2016 s 469(3)

Companies Winding-Up Rules 1972

Rules of Court 2012 O 38, O 38 r 2, 2(2)

Jeremy Khalif (Olivia Lee with him) (Nadzrin Kuok Puthucheary & Tan) for the plaintiff.

Mohd Reza (RM Yeoh with him) (Mohd Imtiaz Choong & Partners) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application in encl 27 by the respondent seeking to cross-examine the petitioners who are deponents of the affidavits supporting their winding up petition against the respondent. At the conclusion of the

hearing, I dismissed the application. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[2] The petitioners, all of whom are UAE nationals, had on 9 June 2008 entered into a shareholders agreement with Low Koon Chuan, Low Say Boon, Low Bee Lay and Elsie Yeo Lai Cheng ('the local parties'), for the purpose of developing a piece of land held under Hakmilik Tanah No PN 180, Lot 463, Seksyen 0019, Bandar Kuala Lumpur into a 33 storey condominium known as 'St John's Wood Residence' ('the project').

[3] This resulted in the petitioners holding 49% of the entire share capital of the respondent, being the property development company for the project, and with the local partners collectively owning the majority stake of 51% in the respondent.

[4] The project failed. The respondent is now in receivership.

[5] On 18 February 2013, the petitioners filed a minority oppression suit under s 181 of the Companies Act 1965 against the local partners. However, the parties managed to agree to record a consent order on 25 April 2013.

[6] Pursuant to the said consent order, Pricewaterhouse Coopers ('PwC') undertook a forensic audit on the respondent and issued a forensic audit report dated 25 June 2014.

[7] On 24 September 2014, the petitioners commenced a writ claim by way of a derivative action against, among others, the local partners and the respondent. This suit was struck out by the court but subsequently filed afresh on 8 November 2016. The defendants in the suit then filed a striking out application against the claim.

[8] On 3 January 2017, the petitioners filed a winding up petition against the respondent. The petition is premised on s 218(1)(f) and (i) of the Companies Act 1965 ('the CA') which concerns the grounds of the directors having acted in the affairs of the company in their own interests, or in any manner which appears to be unfair or unjust to the members, and that it is just and equitable that the company be wound up.

THE CONTENTION OF PARTIES

[9] The respondent is making this application in pursuance of O 38 r 2(2) of the Rules of Court 2012 ('the RC 2012'). The respondent contends that the

basis of the respondent's application to examine the three petitioners in respect of the averments made by the first petitioner on behalf of all three petitioners in their petition and affidavits is to determine the truthfulness of the facts and issues deposed by them therein, which are disputed by the respondent.

[10] The petitioners had alleged misappropriation of sum of monies and fraud against the local partners who were the directors of the respondent at the material time (apart from Elsie Yeo). The directors were claimed to have misappropriated sums of monies while the respondent was under their control. The respondent thus contended that it would be necessary for the respondent to be allowed to cross-examine the first petitioner, being the deponent of the affidavits filed to support the winding up petition, together with the second and third petitioners, in order to adduce their oral statements, as well as to determine the accuracy of each and every statement made in their affidavits.

[11] The petitioners resisted this application. They submitted that the application under the Rules of Court 2012 is not recognised under the Companies Winding-Up Rules 1972. They asserted that their allegations in the averments of the first petitioner as the deponent on behalf of all three petitioners are based on facts which are supported by documents exhibited to the petition. The affidavits in opposition and other affidavits for the respondent merely denied the allegations without credible explanations. I will now discuss the issues.

EVALUATION AND FINDINGS BY THIS COURT

[12] But first, a brief mention of the law governing the subject of the instant application. Order 38 r 2(2) of the RC 2012 states:

> (2) In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[13] In *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FJ (later Lord President) said thus:

> To allow or not to allow the respondent's application to cross-examine the appellant's witnesses upon their affidavits, I take it, is a matter of court's discretion. In appropriate circumstances, there is no reason why such application should be refused merely because the deponent is a foreigner living outside the jurisdiction (*Re Lucas* [1952] 1 All ER 102); 'otherwise foreigners would have an advantage' (*Strauss*

v Goldschmidt 8 SLR 239). It is really a matter of common sense and an elementary legal principle that a party who swears an affidavit much be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause vexatious or motivated by desire to delay the proceedings (*Allen v Allen* [1894] P 239). In view of the appellant's application for judgment under O 32 r 6, I am not, however, prepared to hold the respondent's application to cross-examine the appellant's witnesses as being without just cause or motivated by desire to delay the proceedings or without bona fide or sham or vexatious.

[14] The respondent claimed that there was no misappropriation or fraud as alleged by the petitioners. The directors had provided the requisite explanations to PWC auditors in the course of the forensic audit exercise. The respondent reiterated that there are conflict of facts raised between the parties in their respective affidavits which thus necessitated cross-examination be done against the deponent for the petitioners, and referred to the Federal Court case of *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 in support.

WINDING UP HEARING BY WAY OF AFFIDAVIT EVIDENCE

[15] In the leading authority of the case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, Lord Templeman, delivering the opinion of the Privy Council stated:

The Company's (Winding-Up) Rules 1972 provide for a winding up petition to be verified by affidavits and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The Court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. On behalf of the respondent in the present case it was submitted that the trial judge paid some attention to the petitioner's disputed allegations of an express assurance but the Board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company.

[16] This case thus clearly explains and reiterates that a winding up petition is heard by way of affidavit evidence. This is the primary rule.

[17] Thus, only in exceptional cases will the court permit the cross-examination of the deponent of the affidavits. This was further underscored in the High Court decision of *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618, where Hamid Sultan JC (as he then was) made this important finding on considerations to permit cross-examination of a deponent in the context of a winding up proceeding:

> [5] The hearing of the petition commenced by the petitioner giving evidence. I realised during the course of hearing the petition that the respondents were attempting to restate what was in the affidavit. I informed them that s 218(1)(i) petition is meant to be petition to be tried by affidavits. Only in exceptional cases that too with the permission of court, can the deponent be cross-examined. I have informed the parties that I will give my grounds in my judgment after hearing why oral evidence in principle should not be allowed in hearing a s 218 petition. My reasons are as follows:
>
> (a) in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 Lord Templeman sitting on the Privy Council observed:
>
> ...
>
> (b) *Tahansan*'s case is not authority for the proposition that oral evidence must be given for purpose of hearing the petition. In fact the law which governs the mode of trial in a winding up petition is set out in s 221(2) of CA 1965 which states as follows:
>
> > (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition.
> >
> > (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
> >
> > (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court;
> >
> > (c) direct that oral evidence be taken on the petition or any matter relating thereto;
> >
> > (d) direct a speedy hearing or trial of the petition or any issue or matter;
> >
> > (e) allow the petition to be amended or withdrawn; and
> >
> > (f) give such directions as to the proceedings as the court thinks fit.
>
> (c) Any party who intends to adduce oral evidence at the trial of the hearing must make an application under s 221 of the CA 1965 and the court must direct to do so. Thus, it is not a substantive right to adduce oral evidence.

(d) There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in winding up applications. Where necessity suggests or expediency requires, it is open to the Judge trying winding up proceedings, to allow oral evidence. Where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application the court must refuse to exercise the discretion to allow oral evidence, as in winding up petition, expedition is absolutely necessary (see *Veeramachineni Seethiah v Bode Venkatasubbiah & Ors* AIR (36) 1949 Madras 675).

(e) In *Chappel House Colliery & Co* [1883] 24 ChD 259, it was stated that the court will not as a rule order a petition to stand over for a long period as it would not be just to the company. To expedite the hearing of winding up proceedings is not only in the interest of the company but also an element of public policy in regard to commercial morality to dispose of the petition early (see *Veeramachineni*'s case).

[18] Apart from the important rule that the petitions for winding up are heard on affidavit evidence, the fact that the Companies Act 1965 and the Companies Winding-up Rules 1972 do not expressly provide for a similar right to apply for the cross-examination of the affidavits as found in the RC 2012 cannot be emphasised enough. This should rightfully mean that the granting of such order for cross-examination in a winding up context ought to be exceptional and only rarely to be granted. For the expeditious hearing of a winding up petition is also an element of public policy.

[19] The basis for this proposition may also be sourced by analogy from what had been made clear by Abdul Hamid Mohamed JCA (later Chief Justice) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 CLJ 248, in the following terms:

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O 18 r 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd*, I pointed out the undesirability of applying such procedure to a winding up petition:

Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s 218 winding-up petition which is more simplified and geared for speedy disposal. The RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of

A the writs and pleadings are provided, for quick disposal in clear-cut cases.

The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-Up) Rules 1972 do not provide for such procedures. They are not necessary.

Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s). (Emphasis added.)

[20] Whilst the said decision was critical of striking out application against petitions, I take the view that the underlying basis for such a stance would apply equally to the application to cross-examine, as it is not specifically provided for in the CA or the Companies Winding-Up Rules 1972, which have been promulgated to achieve expeditious disposal of the petitions in the first place.

[21] The law has already made the prescription that winding up petition is to be heard by way of affidavit evidence. There are no specific provisions on the examination of deponents of affidavits to be used at the hearing of a winding up petition. But I accept that it does not mean that such an application under O 38 of the RC is prohibited or without legal basis. Further, in any event, as shown in *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor*, a not dissimilar application could be made for a direction that oral evidence be taken on a petition, in pursuance of s 469(3) of the Companies Act 2016 (formerly s 221 of the Companies Act 1965). Order 38 r 2 further refers its applicability to action by way of originating summons in a notice of application, which the petition is clearly not. However in the same way that a striking out under the RC 2012 may be applied for against a winding up petition despite the absence of any provision in the Companies Winding-Up Rules 1972 and the Companies Act 1965, I do not think it justifiable that any application for cross-examination in a winding up proceedings is to be outrightly rejected. I would follow the observation of Anuar J (later CJ (Malaya)) in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and*

another application [1994] 2 MLJ 789 that whether cross-examination should be ordered in any matter including a winding up petition is within the discretion of the court.

POWER IS DISCRETIONARY

[22] Having considered the case law authorities on applications to cross-examine, much of which on O 38, the principles of which should similarly apply in winding up proceedings which are also heard an affidavit evidence, in my judgment, the application by the respondent in this instant matter before me is lacking in both merit and substance. First, it must be reiterated that the exercise of the court's power to order or refuse cross-examination of a deponent of an affidavit is discretionary.

[23] Case law authorities more than amply suggest that courts are generally slow to allow cross-examination of a deponent in an interlocutory matter (see for example, the High Court decisions in *Balwant Singh Purba v R Rajasingam* [1987] MLJU 3; [1987] CLJ Rep 468 and *Syarikat Tungaring Kilang Papan Sdn Bhd v Sabah Forest Industries Sdn Bhd & Ors* [1990] 2 MLJ 38). In the instant case, the cross-examination is in the context of a winding up proceedings which are governed under the CA and the Companies Winding-Up Rules 1972. Thus O 38 r 2 or such a power of the court to order cross-examination should be invoked on an even more exceptional basis.

BURDEN ON APPLICANT, THE RESPONDENT HEREIN

[24] Secondly, and no less importantly, it is the applicant for leave to cross-examine a deponent who bears the legal burden to convince the court to exercise its discretion to grant leave, as reiterated by the Court of Appeal in *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638; [2007] 4 CLJ 487 (see also the High Court case of *Charles Koo Ho-Tung v Koo Lin Shen* [2015] MLJU 765; [2016] 2 CLJ 267).

MUST BE MADE IN GOOD FAITH

[25] Thirdly, a key consideration to be weighed by a court called upon to exercise its discretion for the purpose is the need to ensure that the application to cross-examine a deponent is made in good faith, as was stated in the passage attributed to Salleh Abas FJ (as he then was) in *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* referred to earlier. In the instant application however, it is difficult to see the true basis for the same, for the respondent seemed to be disputing every single averment made by the petitioners. Exactly 28 paragraphs which had been affirmed by the petitioners in the 48 paged petition were challenged and sought to be verified by the respondent by way of the

A cross-examination of the deponent. For clarity, I set out only ten of the paragraphs below:

(a) para 7 of the petition:

> Catherine Low and Simon Low are the children of Michael Low and are used to acting under the directors or instructions of Michael Low. As such, Michael Low is the de factor or shadow director of the respondent and the Board of Directors of the respondent are controlled by Michael Low, Simon Low and Catherine Low.

(d) para 15:

> It is clear that Michael Low, Simon Low and/or Catherine Low caused the RM1,500,000.00 paid by the petitioners as advanced for working capital to be siphoned to Michael Low instead. This was done by inserting an entry in the respondent's general account ledger under 'amount due to shareholder', that the sum of RM1,500,000.00 advanced by the petitioners is attributed to Michael Low as a cash deposit from him purportedly made on 22 December 2008 (again it has a remark that 'fund came from Arabs'). Then, Michael Low, Simon Low and/or Catherine Low caused another entry that the sum of RM1,500,000.00 was paid to Michael Low on 2 January 2009 purportedly to reimburse then loan from Michael Low. Taking these 2 transactions together, the ledger prepared by Michael Low, Simon Low and/or Catherine Low gives an impression that the amount of RM1,500,000.00 was advanced to the respondent by Michael Low on 22 December 2008 and was 'repaid' to him on 2 January 2009. This is blatant fraud.

(e) para 35:

> The petitioners contend and will contend that Michael Low and Simon Low's attempted explanations regarding the different awards in the sum of RM82,530,000.00 and RM59,356,500.00 are mere afterthoughts. The petitioners further contend and will contend that Michael Low, Simon Low and/or Catherine Low have forged contractual documents purely for the purpose of misleading the petitioners.

(j) para 52:

> The purported reimbursement or payment of the purported Final DO Charges is clearly fictitious based on the facts and matters set out in the petition. It is thus clear that Michael Low, Simon Low and/or Catherine Low has made illegally enriched themselves and/or their connected persons/companies by a sum of RM386,325.00 at the expense of the respondent and/or petitioners.

(n) para 58:

> It is clear that they ran the respondent's affairs as if the respondent was Michael Low and his family members' private enterprise and treated the respondent's money as if it were their own.

(r) para 71:

> The petitioners contend that Michael Low, Simon Low and/or Catherine Low intended and intends to appropriate the sum of RM724,726.20 for their own or their family's benefit and it appears that they have enlisted one Wong Yee Shiong to collude with them in this exercise and to further mislead PWC. PWC was in fact, mislead. This is shown by the fact that Wong Yee Shiong of KCYS issued conflicting/contradictory documents regarding the receipt of payments from the respondent.

(t) para 76:

> One of the footnotes to all the Annual Reports also states that '[t]he amount due to a director and a shareholder is unsecured, interest free and with no fixed terms of repayment'. The reference 'a director and a shareholder' refers to Simon Low and Michael Low respectively.

(w) para 83:

> It is also significant that Elsie Yeo did not receive any financial benefits from the respondent. Michael Low, Simon Low and/or Catherina Low and their connected persons had used the monies of the respondent as if it was their personal fortune to be used and inflated at will. This is fortified by the fact that Michael Low, Simon Low and/or Catherine Low treated the respondent as part of their AM-EL Group of Companies and represented as such to the world at large.

(z) para 91:

> In this purported settlement exercise, if true, then Catherine Low, by virtue of being a shareholder of AM-EL Holdings Sdn Bhd, a shareholder of AM-EL Construction Sdn Bhd, had also acted in conflict of interest and in breach of her duties and fiduciary duties as director of the respondent.

(bb) para 95:

> Based on the facts and matter set out hereinabove, Catherine Low and Simon Low, the directors of the respondent have acted in the affairs of the company in their own interests and/or that of their family members, connected persons and/or Michael Low, rather than in the interests of the members as a whole, or in a manner which appears to be unfair or unjust to the petitioners.

[26] The point to note is that the petitioners had produced by way of exhibits, supporting documents to strengthen their averments vis a vis the petition which runs into five thick volumes. On the other hand, in contradistinction, many of the averments in reply made by the respondent were not accompanied by documents in support. Thus the true motivation of the respondent in filing this instant application is in some doubt, and good faith cannot readily be imputed.

A MUST IDENTIFY RELEVANT ISSUES

[27] Fifthly, and more critically, the relevant issue for cross-examination must be identified with sufficient clarity by the applicant to ensure that the proposed cross-examination does not constitute a harassment, intimidation and or oppression of the deponent. Thus in the Court of Appeal case of *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd* [2001] 4 MLJ 56; [2002] 1 CLJ 1, Siti Norma Yaakob JCA (as she then was) held:

> The grant or the refusal of an application under O 38 r 2(3) is very much an exercise of a judge's power of discretion and the question that must be determined is whether Abdul Malek J (as he then was) had exercised his discretion judicially. From his written judgment, it is very clear that the learned judge considered the following factors when exercising his discretion.
>
> (1) That the appellants never identified the issues for which they maintain cross-examination had become necessary. This is not surprising as no formal application was made by them. Even so a perusal of the proceedings recorded by the trial judge fails to disclose what the issues are to warrant cross-examination. Apart from stating orally that the respondent's many affidavits by various deponents raise many disputes as to facts, such disputes have not been identified by the appellants. If indeed there are factual disputes, the appellants have also failed to show whether they are relevant to the petition to warrant cross-examination. On the contrary the learned trial judge found that the cross-examination would not advance the cause of justice as there is sufficient affidavit evidence supported by contemporaneous documents to enable the petition to be heard properly without the need of cross-examination.
>
> (2) That the appellants delayed in making the application to cross-examine. The oral application was made on 24 January 1995, the second time the petition was adjourned to be heard on its merits. The learned trial judge considered that the application should have been made earlier when the petition was initially fixed to be heard on its merits on 20 December 1994. There was no indication then that the appellants intended to cross-examine any of the respondent's deponents even though their affidavits had already been filed in court.
>
> Under these circumstances, I do not consider that the learned trial judge had erred in law or in principle when he exercised his discretion as he had put his mind to relevant considerations in deciding as he did. To that extent I see no justification in interfering with the order he had made in the court below.

[28] This is the most critical consideration in an application to cross-examine a deponent of an affidavit, what more in a winding up petition. In the Court of Appeal decision in *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638; [2007] 4 CLJ 487, Tengku Baharudin Shah JCA, in a majority judgment, held instructively as follows:

> [25] You can discern from the authorities referred by the parties that three prime considerations would influence the court in the exercise of its discretion to allow or disallow cross-examination on affidavit. Firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified. Secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only. And thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient affidavit evidence or contemporaneous documents to enable the court to properly decide without the need of cross-examination.

[29] The Court of Appeal, from the above-said passage, thus emphasised on the need for the conflict in affidavit evidence in respect of the relevant issue to be so identified in order to justify a cross-examination of the deponent in question where the truth of the averment in an affidavit must be challenged.

[30] As such, in the instant case, the respondent, who bears the burden of justifying the need for cross-examination must demonstrate with specificity the issues in dispute arising from the affidavits and that once identified, must also show that the disputed issues are truly relevant to be decided in the petition. This, the respondent has patently failed to do. I do not for a moment question that the respondent did dispute the overarching basis for the petition presented by the petitioners, in that the respondent had denied any mismanagement and misappropriation of company funds.

[31] But the respondent never condescended into the details of the averments to identify the specific issues to be challenged, let alone to demonstrate whether those issues were actually relevant to the determination of the petition. Instead, the respondent, in the affidavit in support of this application, merely reproduced the entirety of most of the paragraphs which appeared in the petition, without more. This is demonstrably deficient and cannot progress, what more justify, the respondent's application to cross-examine the deponents.

[32] It is a pre-requisite to an application under O 38 that an applicant like the respondent herein must identify the facts in issue that warrant the cross-examination of the petitioners. Such facts in issue must be shown to be in turn relevant to the determination of the disputed issues in the proceeding. The respondent did not in its notice of application or affidavit filed herein identify the facts and whether these are relevant. Such omission is fatal.

[33] The respondent cannot just dispute but not provide any basis for refuting the averments by the petitioners. Yet, no reasons were given by the respondent to even suggest that the petitioners are not telling the truth, what more when the allegations in the petition are based on documents, some of

which were prepared and produced by the respondent. As such, there is no basis for a cross-examination of the petitioners on the truthfulness of the issues and facts deposed in the petition or affidavits for the petitioners.

WHETHER CONTEMPORANEOUS DOCUMENTS SUFFICIENT

[34] Sixthly, and yet another consideration referred to in *Tetuan Kumar Jaspal Quah & Aishah* is that the cross-examination applied for must be able to promote the cause of justice. This will not be achieved if the said conflict in affidavit evidence could instead be resolved by undisputed contemporaneous documents. As mentioned, the petitioners had exhibited volumes of documents in support of their petition. Such affidavit evidence will be duly examined for the purposes of the hearing of the petition. Nothing has been shown by the respondent to even suggest that any of the documents so exhibited is to be rejected.

[35] Thus, the attempt to cross-examine is both pre-mature because the documents have not been evaluated, and the examination is also potentially superfluous because it adds nothing to the proceedings in the instant case the nature of which is to be heavily reliant on contemporaneous documents in any event.

[36] The proposed cross-examination of the petitioners would in all likelihood only result in the petitioners repeating their averments and making reference to the documents already exhibited. Moreover, there is no doubt that the best evidence rule applies in respect of the key documents exhibited in the petition and affidavits, such as the agreements, forensic report, correspondences and cause papers. That these are contemporaneous documents that concern the matters existing at that point in time cannot be emphasised enough. In that sense, they even have higher evidential value relative to oral evidence.

[37] The importance and superiority of contemporaneous documents had been made clear by the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229. After all, oral evidence involves a testimony as to events that happened in the past whilst contemporaneous documents speak of matters then existing at the time such documents were issued or made (see the Court of Appeal decision in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324). It goes without saying that undisputed documentary evidence in this sense enjoys an even more superior status (see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789). In short, the cross-examination would not likely assist the winding up proceeding any more than what the exhibited

documents already readily would. Thus, a cross-examination in this case would hardly promote the cause of justice.

[38] It is imperative to state that the mere fact that the respondent claimed to dispute the relevant averments of the petitioners is manifestly insufficient a basis to warrant cross-examination. The petitioners had exhibited various documents; the respondent must do more that merely dispute without adequate substantiation by producing its own documentary evidence to furnish a basis for its disputation. In the absence thereof, the petitioners would likely stand by their petition and affidavits exhibiting the various contemporaneous documents. In my view, in this situation, no useful purpose would be served by ordering them to be cross-examined.

CONCLUSION

[39] In view of the above-stated reasons, I find that the respondent has not sufficiently established its case to justify this court exercising its discretion to order the petitioners be cross-examined on their petition and affidavits pursuant to s 221 of the CA or O 38 r 2(2) of the RC 2012. I therefore dismiss the instant application in encl 27, with costs.

Application dismissed with costs.

Reported by Mohd Kamarul Anwar